



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 28, 1994

Mr. David F. Chappell  
Chappell & Handy, P.C.  
1800 City Center Tower II  
301 Commerce Street  
Fort Worth, Texas 76102-4118

OR94-821

Dear Mr. Chappell:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 26556.

The Fort Worth Independent School District (the "school district"), which you represent, has received a request for information relating to allegations of financial misconduct leveled against a high school football coach and other school district employees. Specifically, the requestor seeks the following information:

1. All documents relating to the "Special Investigation" at Western Hills High School.
2. A computer print-out of the last three year's "checks" issued by Western Hills High School's "Interim Finance Fund" including all normal "check" information.

You have submitted some of the requested information to us for review and claim that sections 552.102, 552.103, and 552.111 of the Government Code except it from required public disclosure.<sup>1</sup>

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<sup>1</sup>We assume that the remainder of the requested information has been or will be made available to the requestor. See Open Records Decision No. 363 (1983).

We note at the outset that the federal Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, governs some of the requested information. FERPA provides the following:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information . . .) of students without the written consent of their parents to any individual, agency, or organization . . . .

20 U.S.C. § 1232g(b)(1). "Education records" are records that

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

*Id.* § 1232g(a)(4)(A); *see also* Open Records Decision Nos. 462 (1987) at 14-15; 447 (1986).<sup>2</sup>

Information must be withheld from required public disclosure under FERPA to the extent reasonable and necessary to avoid personally identifying a particular current or former student, unless the information constitutes "directory information." Open Records Decision Nos. 332 (1982) at 3; 242 (1980) at 2; 206 (1978) at 2; 151 (1977). "Directory information" is defined in FERPA as including "the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student." 20 U.S.C. § 1232g(a)(5)(A). Under FERPA and the Open Records Act, an educational agency or institution must release all information about current students that can be treated as directory information after it gives public notice of what categories of information the agency or institution has designated as directory information and allows a reasonable period of time after giving the notice to permit the parents or eligible students<sup>3</sup> to object to the release of any or all of the

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<sup>2</sup>The phrase "student record" in section 552.114 has generally been construed to be the equivalent of "education records." Thus, our resolution of the availability of this information under FERPA in this instance also resolves the applicability of section 552.114 to the requested information. *See generally* Attorney General Opinion H-447 (1974); Open Records Decision Nos. 539 (1990); 477 (1987); 332 (1982).

<sup>3</sup>Eligible students are students who are age 18 or over or who attend an institution of postsecondary education. Once a student becomes an eligible student, the parents' rights under FERPA attach to the student. 20 U.S.C. § 1232g(d); 34 C.F.R. § 99.3.

directory information without prior consent. 20 U.S.C. § 1232g(a)(5)(B); Open Records Decision No. 242 at 2. An educational agency or institution does not, however, have to follow this procedure before disclosing directory information about former students. 34 C.F.R. § 99.37(b); Open Records Decision No. 151 (1977) at 3. Therefore, under the Open Records Act, an educational agency or institutional must simply release directory information about former students

We have examined the information submitted to us for review. It reveals the names of students and other information the release of which would make the students' identities "easily traceable." See 34 C.F.R. § 99.3 (providing that nondisclosure may be required if disclosure would make a student's identity "easily traceable"). Some of this information is, however, directory information related to current or former students. You must withhold the identifying information about students that is not directory information and must release the directory information about former students. For all the directory information regarding current students, you must follow the procedures set out in FERPA for designating directory information and then must release the directory information unless the parents or eligible students object to its release. For your convenience, we have marked the type of information that falls within each category.

Next, we address your assertion that section 552.102 of the Government Code excepts the requested information from required public disclosure. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."<sup>4</sup> Section 552.102 protects information only if its release would cause an invasion of privacy under the test articulated for section 552.101 by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). See *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Under the *Industrial Foundation* case, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public. Generally, the public has a legitimate interest in the job qualifications of public employees. Open Records Decision Nos. 470, 467 (1987). Information previously held by this office not to be protected by common-law privacy interests includes, for example, applicants' and employees' educational training, kind of work, salary, and reasons for leaving, and job performance or ability. See Open Records Decision No. 455 (1987); see also Open Records Decision Nos. 470, 467 (1987); 444 (1986); 421 (1984); 405 (1983).

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<sup>4</sup>Section 552.102(b) also protects from required public disclosure transcripts from institutions of higher education in the personnel files of professional public school employees. Section 552.102(b) expressly excludes from this protection information on a transcript detailing the degree obtained and the curriculum pursued. See Open Records Decision No. 526 (1989). The requested information does not include the transcripts of professional public school employees.

We have examined the information submitted to us for review. It does not include any information that is intimate or embarrassing. In addition, the submitted information is of legitimate public concern. Accordingly, we conclude that the school district may not withhold the submitted information under section 552.102 of the Government Code.

Next, we address your assertion that section 552.103(a) of the Government Code excepts the requested information from required public disclosure. Section 552.103(a) excepts from disclosure information

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

For information to be excepted from public disclosure by section 552.103(a), litigation must be pending or reasonably anticipated and the information must relate to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 (1990) at 5. A surmise that litigation will occur is not enough; there must be some concrete evidence pointing to litigation. Attorney General Opinion JM-266 (1984) at 4; Open Records Decision Nos. 518 (1989) at 5; 328 (1982). This office has concluded that a reasonable likelihood of litigation exists when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, *see* Open Records Decision No. 551, and when a requestor hires an attorney who then asserts an intent to sue, *see* Open Records Decision No. 555 (1990). On the other hand, the mere fact that a person, on more than one occasion, publicly states an intent to sue does not trigger section 552.103(a). Open Records Decision No. 452 (1986).

You advise us that the high school football coach who is the subject of the requested investigation has been disciplined. We understand that the disciplined football coach has filed a defamation and negligence action against a school district employee, seeking damages allegedly caused by the employee's nonperformance of his official duties. Moreover, the coach has alleged lapses in due process and is seeking an administrative due process hearing before the Texas Education Agency. Nonetheless, we conclude that you have not demonstrated that litigation in this instance is reasonably anticipated. In his letter to the school district, the football coach's attorney indicates that he has no intention of suing the school district. Furthermore, the football coach apparently has no cause of action against the school district. The school district can only be sued in tort for incidents involving motor vehicles. *See* Civ. Prac. & Rem. Code §§ 101.021, .051. Finally, we do not believe that the football coach's request for a

"hearing" before the superintendent is enough to establish that litigation is reasonably anticipated. We conclude, therefore, that the school district may not withhold the submitted information under section 552.103(a) of the Government Code.

Finally, we consider whether the school district may withhold the "Special Investigation" materials under section 552.111 of the Government Code. Section 552.111 excepts from disclosure an "interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the section 552.111 exception and concluded that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body at issue. In addition, this office concluded that an agency's policymaking functions do not encompass internal administrative or personnel matters. Open Records Decision No. 615 at 5-6.

Having examined the submitted information, we conclude that it relates to an internal personnel matter. The focus of the "Special Investigation" is the conduct of certain school district employees in the use and management of school district funds. Some of these employees are alleged to have acted improperly. Except perhaps tangentially, the "Special Investigation" does not evaluate school district policies, nor does it offer anything more than a factual inquiry into the job performance of certain school district employees. We conclude, therefore, that the materials generated in the course of the "Special Investigation" relate to an internal administrative or personnel matter. Accordingly, section 552.111 of the Government Code does not except them from required public disclosure. Except as noted above, the school district must release the requested information in its entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Margaret A. Roll". The signature is written in a cursive, flowing style.

Margaret A. Roll  
Assistant Attorney General  
Open Government Section

MAR/GCK/rho

Enclosures: Submitted documents

Ref.: ID# 26556

cc: Mr. Robert C. Ballew  
3101 Softwind Trail  
Fort Worth, Texas 76116-4730  
(w/o enclosures)